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SOL (MSHA) V. C F& I STEEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER
v.

CIVIL PENALTY PROCEEDING
DOCKET NO. WEST 79-240
A/C No. 05-02820-03009

C F & I STEEL CORPORATION,
RESPONDENT

Mine: Maxwell

Appearances:

James H. Barkley, Esq., Office of Henry C. Mahlman,
Associate Regional Solicitor, United States Department of Labor,
Denver, Colorado 80294,
For the Petitioner

Phillip D. Barber, Esq., Welborn, Dufford, Cook and Brown
Denver, Colorado 80202,
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent CF&I Steel Corporation, (CF&I), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Petitioner issued citation number 387763 pursuant to Section 104(a) of the Act [30 U.S.C. 814(a)]. It is alleged that CF&I violated Part 30, Code of Federal Regulations, Section 75.200 which provides as follows:

75.200 Roof control programs and plans.
[Statutory Provisions]

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions

thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

After notice to the parties a hearing on the merits was on April 1, 1981 in Denver, Colorado.

ISSUES

The issues are whether a violation occurred and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

The CF&I Maxwell Mine is open by one slope from north to south. At the foot of the slope it bends to the right and is developed with 14 parallel entries separated into three development sections. Unit 2 of the mine includes entries 10, 11, 12, 13, and 14. There are two shafts, one entry and one return (Tr. 7).

CF&I reported an unintentional roof fall in entry 14. The fall occurred late in the evening on January 25. The resulting MSHA inspection occurred February 6, 1979 (Tr. 7, 19).

In entry 14 conditions in the roof were good until 9 o'clock on the 25th (Tr. 56-57). The roof was smooth and the roof bolters during the work shift had been drilling into substantial roof (Tr. 58). In the week before the 25th no deficiencies were observed in the roof (Tr. 58). On January 25 they had just broken the crosscut through and the roof condition were good with no water, flaking, spalling, spealing, or sloughing (Tr. 62, 63). About 9 p.m., when the conditions changed, the underground section foreman called the superintendent. The superintendent ordered the men and machinery withdrawn. Breaker props were ordered set up to keep everyone out (Tr. 63). The superintendent further directed that six foot pins be used when starting in the adjacent entry, number 13 (Tr. 63, 64).

~591

On January 26 MSHA's inspector Rivera and CF&I's Massarotti and Cambrozzi went into the 14 entry. [Rivera did not appear as a witness nor does the record indicate how or why he appeared at the mine on January 26]. In any event, it was decided not to take the chance of exposing anyone to the hazards involved in further supporting the roof in entry 14 (Tr. 64).

It was decided to let the roof fall and breaker posts were installed. The timbers prevented anyone entering the area (Tr. 64-65).

On the 26th water was coming out of the roof. This point was marked on a company map. A week later water was encountered in entry 13. This point was also entered on the map (Tr. 67, 68, P1).

When water was seen on the 26th it was decided to continue using six foot bolts throughout this area including the intersections, the entries, and the crosscuts (Tr. 67). CF&I had been using 48 inch pin at the straights as well as six and five foot bolts in the intersections (Tr. 67). Additional measures after the 26th included timbers and steel beams when water was encountered (Tr. 69).

CF&I abated the citation by securing MSHA's approval for a proposed amendment to its roof control plan (Tr. 29-32, 72-73, R2). The three items required by the amendment were in use by CF&I before February 6, 1979 (Tr. 72-73).

DISCUSSION

The citation in this case alleges that "after an unintentional roof fall above the anchorage zone of the roof bolts no changes or revisions have been implemented to improve or upgrade the existing roof control program. The operator shall submit intended revisions or improvements to the District Manager for approval" (R1).

Contrary to MSHA's allegations I find from the evidence that CF&I did, in fact, improve its roof control plan. When the roof began to deteriorate the superintendent ordered an increase in the size of the roof bolts that were to be used in entry 13. Further, the area in which the cave-in occurred was redlined and timbers prevented anyone from entering.

The three changes in the CF&I roof control plan submitted by CF&I to MSHA on March 12, 1979 included more as well as closer roof bolts, additional support if water was encountered, and breaker timbers to confine a caved area. All of these were in use before the inspection date of February 6, 1979 (Tr. 72-73). Accordingly, I conclude that CF&I upgraded its roof control plan and the breakers further prevented workers from entering the hazardous area.

MSHA's second contention focuses on the proposition that given the attendant circumstances CF&I should have done more than merely increase the size of its roof bolts in entry 14.

MSHA is correct in its pronouncement of the law that an operator may be in violation of 30 C.F.R. 75.200, even though it is complying with the minimum requirements of its roof control plan. Zieler Coal Company 2 IBMA 220, September 18, 1973. However, the evidence relied on by MSHA does not stretch as far as MSHA claims.

MSHA asserts that the MSHA inspector had previously advised CF&I that its roof support was inadequate in the presence of adverse roof. The record fairly supports the view that MSHA, since the last review of the roof control plan, had been "after" the company to upgrade the roof control plan. On the other hand CF&I felt the plan was adequate (Tr. 10, 44). CF&I acknowledges that the MSHA inspector told the company that the roof supports in areas of the Maxwell Mine were inadequate (Tr. 87). I am, however, obliged to accept the inspector's testimony that he couldn't remember any adverse conditions in entry 14 before January 25, 1979 (Tr. 19, 27). In addition he couldn't recall that the roof was unsafe before the fire bosses' report. (It was the fire boss who reported the initial roof fall). Since MSHA's theory is that the roof control plan was inadequate in the presence of adverse roof then it bears the burden of establishing that such adverse conditions were present.

MSHA contends that CF&I's records and mapping of the strike zone (FOOTNOTE 1) establish that adverse roof conditions existed.

A fair reading of the evidence shows that the so-called records were developed after the roof fall on January 25/26. The MSHA inspector's testimony establishes that CF&I could not have known of the strike zone: at the time the strike zone was marked the inspector couldn't remember how far the zone extended; in addition the mine had not developed far enough to show the strike zone (Tr. 11, 28). The zone would not have been apparent to the operator before February 6, 1979 (Tr. 28). The roof fall was fairly close to the working face so the strike zone couldn't have been noted to any great extent other than the signs that were visible, that is, the changes in the roof (Tr. 28).

Petitioner relies on additional evidence to support his citation. This evidentiary detail is now considered:

~593

The MSHA inspector testified that when he inspected the mine there was water and spalling 50 to 75 feet outby the caved area (Tr. 41-42). This condition, in his opinion, should have put CF&I on notice prior to January 25/26 that additional roof support was needed (Tr. 41-42). However, I don't find that credible. Basically, I credit CF&I's contrary evidence that there was no water or spalling outside of the caved area (Tr. 71-72).

The inspector further testified that the conditions he found on February 6 would have been readily observable prior to that day (Tr. 44-45). I agree but the foregoing testimony is not determinative of the issue. The condition observed on February 6 had no doubt been there at least from January 25/26.

The uncontroverted testimony from the MSHA inspector is that it is more hazardous to let a roof fall than to adequately support it in the first place. The basis for this testimony is that after a roof fall miners must go in and clean up under an unsupported roof. They must also resupport it.

The clear thrust of MSHA's argument is that roof falls must never occur. This is a laudable objective that cannot always be attained. However, two difficulties arise with MSHA's argument. First of all, there is no evidence that the miners would be working under the unsupported roof while they clean up the rock fall area, and a further difficulty with MSHA's position is that the conditions here rapidly developed and the roof rapidly deteriorated. When this occurred the men and machines were withdrawn. The inspector clearly stated that nobody in their right mind was going to go back into the area after the men were withdrawn. In short, no one claimed that CF&I personnel should attempt to resupport the roof after the initial fall on January 25/26. (Tr. 25, 26).

MSHA's view appears to be based on hindsight rather than on the operative facts.

EVIDENTIARY RULINGS

The Judge excluded evidence of a later roof fall in entry 13 because the record failed to establish any connection between the two roof falls (P1). In addition, the second roof fall was the subject of a decision by Judge Jon Boltz involving the same parties. The case was docketed as WEST 79-291 (3 FMSHRC 1870). The findings in Judge Boltz's case are not factually controlling in this case and in a separate order I refused CF&I's motion to file a supplemental brief citing Judge Boltz's factual findings and his conclusions based thereon (Order, March 19, 1982).

~594

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

Citation 387763 and the proposed penalty therefor are vacated.

John J. Morris
Administrative Law Judge

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~FOOTNOTE ONE

1 A strike zone is a crack or fissure in a roof with water, spalling and sloughing (Tr. 10); also a strike is the direction or bearing of a horizontal line in the plane of an inclined stratum. U.S. Department of Interior Bureau of Mine, A Dictionary of Mining, Mineral and Related Terms, 1089 (1968).